(9)

No. 96-6133

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

WILLIAM BRACY, *Petitioner*,

v.

RICHARD GRAMLEY, Warden, Pontiac Correctional Center,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH
CIRCUIT

BRIEF *AMICUS CURIAE* OF THE STATES OF CALIFORNIA, ALABAMA, ARIZONA, DELAWARE, NEVADA, NEW YORK, OKLAHOMA AND VIRGINIA IN SUPPORT OF RESPONDENT

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
*DONALD E. DeNICOLA
Supervising Deputy Attorney General
DAVID F. GLASSMAN
Deputy Attorney General
*Counsel of Record
300 South Spring St.
Los Angeles, CA 90013
Telephone: (213) 897-2355
Counsel for Amici
[additional counsel on inside cover]

19 pp

COUNSEL

Bill Pryor
Attorney General
of Alabama
Alabama State House
11 South Union Street
Montgomery, AL 36130
(334) 242-7300

M. Jane Brady
Attorney General
of Delaware
820 N. French Street
Wilmington, DE 19801
(302) 577-2055

Dennis C. Vacco
Attorney General
of New York
The Capitol
Albany, NY 12224
(518) 474-8101

James S. Gilmore, III
Attorney General
of Virginia
900 East Main Street
Richmond, VA 23219
(804) 786-2071

Grant Woods
Attorney General
of Arizona
1275 W. Washington Street
Phoenix, AZ 85007
(602) 542-4686

Frankie Sue Del Papa
Attorney General
of Nevada
Capitol Complex
Carson City, NV 89710
(702) 687-4170

W.A. Drew Edmondson
Attorney General
of Oklahoma
State Capitol Building
2300 N. Lincoln Blvd.
Room 112
Oklahoma City, OK 73105
(405) 521-3921

QUESTION PRESENTED

Whether a habeas petitioner who was convicted of a capital offense and sentenced to death before a trial judge who admittedly accepted bribes in other contemporaneous criminal cases is entitled to discovery to support his claim that he was denied the right to a trial before a fair and impartial judge.

TABLE OF CONTENTS

TABLE OF CONTENTS, CONT'D

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES, CONT'D

INTEREST OF AMICI CURIAE

This case presents significant questions regarding the scope of permissible discovery in federal habeas corpus cases brought by state prisoners. Since the States bear most of the costs of federal habeas review, the amici have an interest in minimizing these costs by insuring that discovery is limited to claims that are properly before a federal court. Amici also have an interest in preserving the finality of state court criminal judgments from remote attacks unrelated to a petitioner's guilt of the underlying crime. The Antiterrorism and Effective Death Penalty Act of 1996 limits the availability of evidentiary hearings in federal habeas, and would prohibit a hearing in the present case.

This brief is submitted by amici through their respective Attorneys General in accordance with Rule 37.5 of the Rules of the Supreme Court.

SUMMARY OF ARGUMENT

A habeas petitioner's entitlement to discovery must be considered in light of the standards announced in the Antiterrorism and Effective Death Penalty Act of 1996. The Act applies to pending cases, including this case. The Act's new amendment of 28 U.S.C section 2254(e) prohibits a federal evidentiary hearing on claims that a petitioner failed to develop in state court. Petitioner in this case did not develop the factual basis of his claim in state court. Nor can he make out an exception under the statutory criteria since he cannot demonstrate, and indeed does not claim, factual innocence of the underlying crime. Since petitioner would not be entitled to an evidentiary hearing under the Act, he is not entitled to discovery regarding the claim.

ARGUMENT

THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 APPLIES TO THIS CASE AND PROHIBITS PETITIONER'S PROPOSED DISCOVERY BECAUSE PETITIONER CANNOT SATISFY THE ACT'S REQUIREMENTS FOR AN EVIDENTIARY HEARING

A. Introduction

On April 12, 1996, the court of appeals affirmed the judgment of the district court dismissing the petition for a writ of habeas corpus in this case. *Bracy v. Gramley,* 81 F. 3d 684 (7th Cir. 1996). Ten days later the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, which contains provisions curtailing the scope and availability of federal habeas corpus for state prisoners, including condemned prisoners, and in particular limits the circumstances in which habeas petitioners are entitled to evidentiary hearings in federal court. Amici submit that the Act's repeal of discretionary evidentiary hearings applies to this case. As we will show, since petitioner cannot satisfy the Act's requirements for an evidentiary hearing, he is not entitled to discovery on his underlying claim of judicial bias.

B. The Issue Addressed By Amici Is Necessarily Presented In This Case In Light Of The Grant Of Certiorari In *Lindh v. Murphy*

New section 2254(e) of Title 28 of the United States Code now prohibits evidentiary hearings in federal habeas cases where the petitioner has failed to develop the factual basis for a claim in state court. This prohibition was not addressed by the court of appeals or the parties because this case was briefed and decided prior to enactment of the Act. Since then, however, the Act has been signed into law and this Court has granted certiorari in *Lindh v. Murphy,* No. 96-6298, to decide the extent to which the habeas corpus provisions of the Act apply to pending cases. 117 S. Ct. 726 (1997). The question presented in this case, regarding the extent to which a habeas petitioner is entitled to discovery, necessarily depends on the circumstances in which a petitioner is entitled to an evidentiary hearing. Given that the Act alters the standards for granting an evidentiary hearing, the effect of the evidentiary hearing provisions of the Act is a subsidiary question fairly included in the question presented. *See Mackey v. United States,* 401 U.S. 667, 684 (1969) (opinion of Harlan, J.); *Caspari v. Bohlen,* 114 S. Ct 948, 953 (1994); *Teague v. Lane,* 489 U.S. 288, 300 (1989).

C. The Antiterrorism And Effective Death Penalty Act's Repeal Of Discretionary Evidentiary Hearings Applies To This Case

New section 2254(e) provides in relevant part:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that --

> (A) The claim relies on --
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
> (B) The facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Because the Act does not explicitly state when the amendment concerning entitlement to an evidentiary hearing takes effect, it becomes operative on the date of enactment unless its operation would be "retroactive" in the sense of attaching new legal consequences to events completed before its enactment. *Landgraf v. USI Film Products,* 511 U.S. 244, 254, n. 23 (1994). "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law." *Id.* at 269. A court considers, for example, whether the statute deals primarily with the court's jurisdiction, procedures, or power to grant prospective relief; or whether, instead, it "impair[s] rights a party possessed when he acted, increase[s] a party's liability for past conduct, or impose[s] new duties with respect to transactions already completed." *Id.* at 261. In the former situation, a court should "apply the law in effect at the time it renders a decision" -- that is, apply the intervening new statute immediately to the case at bar." *Id.* at 242. In the latter case, typically arising in the areas of "contractual or property rights" where actors rely on the predictability and stability of the law at the time of the

transaction, a court presumes that the new law does not apply "retroactively" to alter the effect of the prior primary conduct of individuals in a new way. *Id.* at 256.

The limitation on evidentiary hearings is, manifestly, a rule governing a federal court's procedures and power to grant prospective relief. As such, it "speak[s] to the power of the court rather than to the rights or obligations of the parties," and regulates "secondary" rather than "primary" conduct, so that its immediate application to a pending case would not truly be "retroactive." *Landgraf,* at 257 ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.") It does not affect any "right" petitioner possessed when he "acted," increase his liability for past conduct, or impose any new duties with respect to completed transactions. *Id.* The reform does not increase petitioner's liability for prior conduct. It does not defeat any of his legitimate reliance interests. It does not impose upon him new duties with respect to transactions already completed. It does not divest him of a "vested right." It does not even purport to govern petitioner's "primary" conduct. The evidentiary hearing restriction, instead, is a rule governing court procedures. In light of the foregoing criteria, the reform prohibiting discretionary evidentiary hearings in cases where the petitioner has failed to develop the factual basis of claims in state court would apply to the case at bar. It should therefore apply immediately to a pending case such as this one.

Even if new section 2254(e)(2) were deemed genuinely "retroactive" in the *Landgraf* sense, the normal "default" rule against retroactive application should not be invoked in the special context of remedial habeas corpus legislation. The essential nature of federal habeas corpus is that of a "secondary and limited" collateral attack on the fully-litigated state trial that serves as the true "main event" in the criminal process. *Barefoot v. Estelle,* 463

U.S. 880, 887 (1983). Because of the removed and "extraordinary" nature of the collateral habeas process, the background federal habeas policies of comity and finality with respect to state criminal convictions provide a unique setting in which the legitimate reliance interests that ordinarily would inform the court's application of *Landgraf* lie peculiarly with the State and not with the habeas petitioner. *See Lockhart v. Fretwell,* 506 U.S. 364 (1993) (the State, but not the petitioner, may rely on intervening change of law in federal habeas proceedings); *McCleskey v. Zant,* 499 U.S. 467 (1991) (new stricter rules on abuse-of-writ doctrine announced and applied to defeat habeas petition); *Coleman v. Thompson,* 501 U.S. 722 (1991); *Brecht v. Abrahamson,* 507 U.S. 619 (1993) (relaxed harmless-error rule announced and applied to defeat habeas petition); *Teague v. Lane,* 489 U.S. 288 (1989) (habeas court may not announce or apply intervening new rules for petitioner's benefit).

D. A Habeas Petitioner Is Not Entitled To Discovery To Support A Factual Claim That Cannot Be Addressed At An Evidentiary Hearing

This case presents the question of whether petitioner is entitled to discovery to support his claim that he was denied the right to a trial before an impartial judge since the judge had accepted bribes in unrelated cases. The factual predicates of that claim were never developed in state court proceedings. The forum to develop and prove the predicate facts would therefore necessarily be an evidentiary hearing in the federal court. After all, discovery is only allowed in the habeas context "when the court considers that it is necessary . . . in order that a fair and meaningful hearing may be held . . ."

Harris v. Nelson, 394 U.S. 286, 300 (1969).[1] In view of the Act's standards for allowing an evidentiary hearing, however, petitioner's claim could not be the subject of a hearing.

Again, the Act provides:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that --
>
> (A) The claim relies on --
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Petitioner failed to develop the factual basis of his judicial corruption claim in state court proceedings. Petitioner might argue that fault is required before a petitioner's failure constitutes a bar; and that, since he raised the claim as soon as he could discover it, but after the time had passed for the state supreme court to hear claims arising out of his trial, he did not "fail to develop" the claim in state court.

---

1. To the extent the comments of the Advisory Committee accompanying Rule 6 of the Rules Governing Section 2254 Cases in the District Courts suggest a broader right, those comments misread *Harris v. Nelson* and would be obsolete in light of the Act.

However, when the statute's reference to a "failure to develop" ((e)(2)) on the part of a petitioner is read in connection with the "could not have been previously discovered" language ((e)(2)(A)(ii)), it becomes clear that the entire subsection encompasses all non-development of factual claims, regardless of cause or fault. It would be redundant for a petitioner to demonstrate that the facts sought to be introduced at an evidentiary hearing could not have been acquired previously through exercise of due diligence if the section applied only to those situations where a petitioner was "at fault" for having "failed to develop" them in the first place. Thus, *any* non-development of the facts underlying a claim must be subjected to the criteria of subdivisions (A) and (B).

Nor does petitioner's claim rely on any retroactive rule previously announced by this Court. The court of appeals properly recognized the novelty of the claim when it invoked *Teague v. Lane*. Consequently, subdivision (2)(A)(i) is inapplicable. Petitioner must therefore satisfy subdivision (2)(A)(ii) and (B) en route to gaining an evidentiary hearing.

Even where a petitioner seeks application of law that has been expressly made retroactive in application or has demonstrated good cause for belated development of facts, that petitioner must satisfy subsection (B) of the Act before federal development of the underlying facts is permitted.

The claim of generalized bias in this case could not satisfy subsection (B). Stated another way, even the most liberal interpretation of petitioner's claim would amount to much less than the required "clear and convincing evidence" that, but for the alleged error, no reasonable factfinder would have found petitioner guilty of capital murder.

As the court of appeals observed in this case, a claim of generalized judicial bias relies far more on speculation than empirical evidence. 81 F. 3d at 690.

After all, the discretionary rulings that petitioner might wish to attribute to bias were independently reviewable on appeal. "To show this (bias in the judge's rulings) would not have required an . . . investigation, but merely a review of the transcript of the trial . . . . The Supreme Court of Illinois did not find any errors in the rulings." *Id.* The district court in this case similarly concluded that petitioner's theory of bias "is only a matter of speculation." 868 F. Supp. at 991.

Since there is no claim of a bribe in this case, the grant of discovery under these circumstances would only mean that miscellaneous details of the judge's corruption in unrelated cases could be presented to the district court as a precursor to the petitioner's request that the court speculate that bias somehow infected this case even though -- as already noted -- petitioner could not demonstrate error per se in the trial judge's discretionary rulings.

It is not surprising, in light of the lack of evidence of prejudice and the lack of the potential for such evidence, that petitioner stresses that a showing of judicial corruption in the underlying case (unlike here, where the bribes were taken in unrelated cases) requires only a *de minimis* showing to justify relief, and does not involve consideration of the strength of the evidence against the petitioner. *See* Pet'r Br. at 13, at 14 (referring to "strict rule" invalidating any case of possible corruption), at 15 ("possible temptation . . . is sufficient to establish a due process violation"), at 16 (bribes in unrelated cases is "sufficiently suggestive" of a "possible" due process violation).

Petitioner's theory, accurately described as "only a matter of speculation," 868 F. Supp at 991, cannot be reconciled with the Act's explicit requirement of clear and convincing evidence of innocence. This Court has held, in the specific context of procedural default in a habeas case, that the "not guilty of the underlying offense" rule requires

that a petitioner demonstrate actual innocence. *Schlup v. Delo,* 115 S. Ct. 851, 867 (1995); *Sawyer v. Whitley,* 503 U.S. 333, 348 (1992). In other words, petitioner must show by clear and convincing evidence that absent the presence of this judge no reasonable juror would have found him guilty, as he was not guilty.

Petitioner does not even attempt to meet that standard. The evidence of petitioner's guilt is, according to the court of appeals, "compelling." 81 F. 3d at 687. In confirming the sufficiency of that evidence, the district court observed that the jury's verdict "is amply supported by the evidence." 868 F. Supp. at 978. Thus, both federal courts that have reviewed the evidence against petitioner have recognized the strength of the evidence. In the face of that evidence, petitioner could not obtain an evidentiary hearing (even if he had satisfied the Act's preceding provisions) since as a matter of law he cannot demonstrate "actual innocence." Since petitioner is not entitled to an evidentiary hearing, he is necessarily not entitled to discovery. *See Harris v. Nelson,* 394 U.S. at 300.

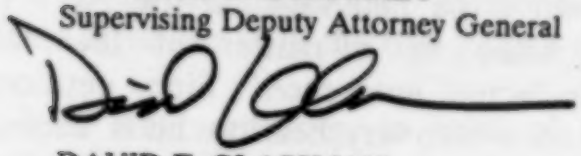
CONCLUSION

For the foregoing reasons, amici respectfully ask that the decision of the court below be affirmed.

Dated: March 20, 1997.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
*DONALD E. DeNICOLA
Supervising Deputy Attorney General



DAVID F. GLASSMAN
Deputy Attorney General
*Counsel of Record

Counsel for Amici

DFG:gm